Supreme Court, U.S.
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No. 90-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNELKO CORP., an Arizona corporation and HOWARD G. OHLHAUSEN, an individual,

Petitioners,

vs.

ANDY ROONEY, an individual, and CBS, INC., a New York Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ANDY ROONEY AND CBS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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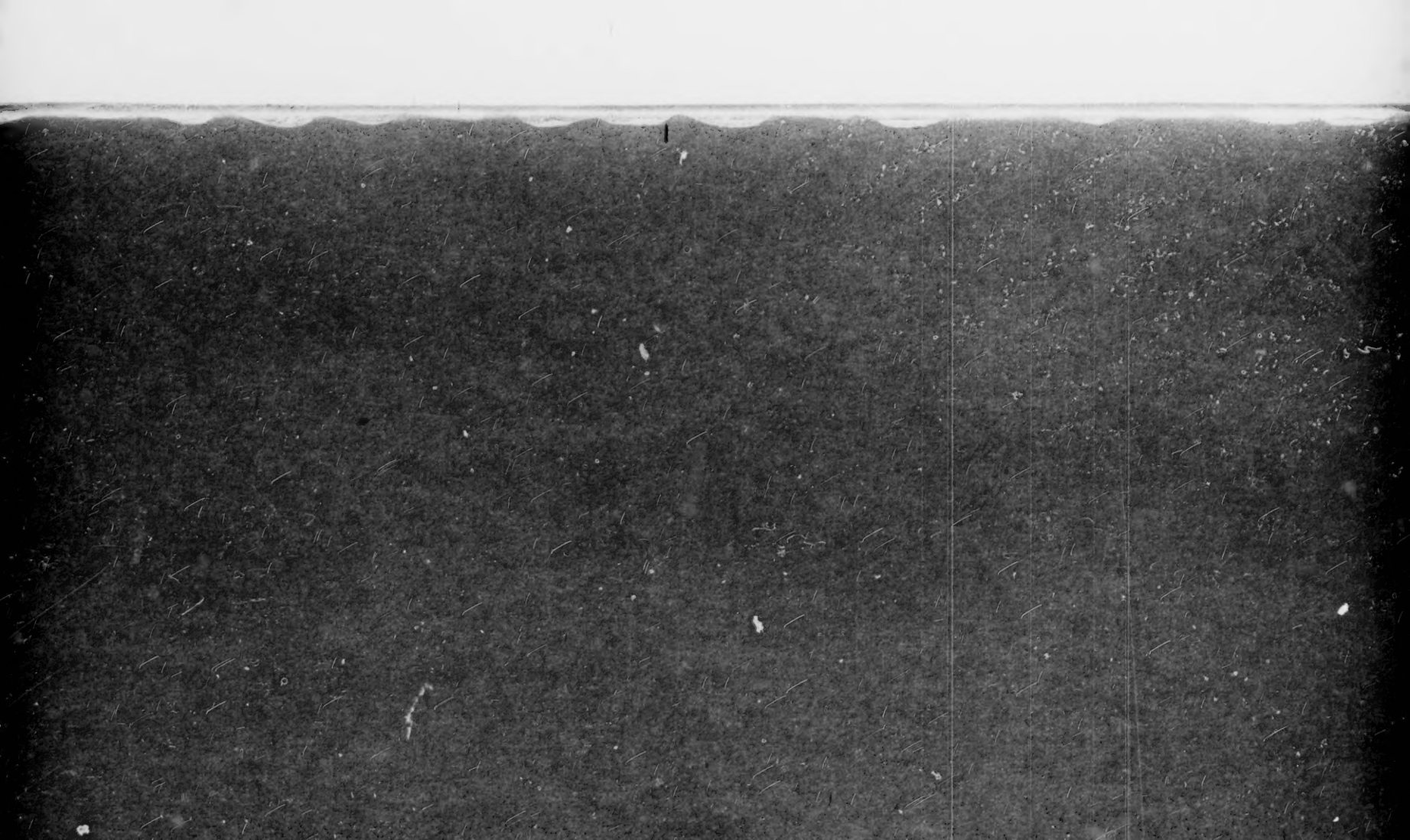

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS APPROPRIATELY AFFIRMED SUMMARY JUDGMENT DISMISSING PETITIONERS' COMPLAINT, WHERE THE COURT FOUND THAT PETITIONERS FAILED TO DEMONSTRATE THAT RESPONDENTS' STATEMENTS ABOUT PETITIONERS' PRODUCT WERE FALSE.

2. WHETHER THE COURT OF APPEALS APPROPRIATELY AFFIRMED THE DISTRICT COURT WHERE ONE OF THE TWO GROUNDS SUPPORTING THE DISTRICT COURT'S HOLDING WAS WARRANTED.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

SUBSIDIARIES AND AFFILIATED COMPANIES OF CBS INC.*
(as of 12/31/90)

	State or Country of Incorporation	Percent of Voting Shares Held by Immediate Controlling-Parent
Aspenfair Music, Inc.	California	100
Bala Cynwyd Associates [General Partnership]	Pennsylvania	50
Beverlyfax Music, Inc.	California	100
CBS Broadcast International of Canada Limited	Canada	100
CBS Broadcast Services Ltd.	England	100
CBS Pension Trustees U.K. Limited	England	100
CBS FMX Stereo Inc.	New York	100
CBS/FOX Company, The [General Partnership]	New York	50
CBS/FOX VIDEO (Holdings) Ltd.	England	10
CBS/FOX VIDEO Limited	England	100
CBS/FOX VIDEO (Germany) G.m.b.H.	Germany	100
CBS/FOX VIDEO (South Pacific) Pty Ltd.	Australia	100
CBS/FOX VIDEO (Canada) Ltd.	Canada	100
CBS/FOX VIDEO (Espanola) S.A.	Spain	100
CBS/FOX VIDEO French Film Licensing Corp.	New York	100
CBS/FOX VIDEO (France) S.A.	France	100

* Inactive subsidiaries are not included in this listing.

	State or Country of Incorporation	Percent of Voting Shares Held by Immediate Controlling-Parent
CBS/FOX VIDEO International S.A.R.L.	France	100
CBS/FOX VIDEO (New Zealand) Limited	New Zealand	99.99**
CBS/FOX VIDEO (Far East) K.K.	Japan	100
CBS Gramophone Records & Tapes (India) Ltd.***	India	40
CBS/MTM Company [General Partnership]	California	50
CBS News Special Projects Inc.	New York	100
CBS Overseas Inc.	New York	100
CBS Urban Renewal Corporation	New Jersey	100
Columbia Television, Inc.	New York	100
Galatea Productions, Inc.	Texas	100
Granite Holdings Inc.	New York	100
Katy Film Productions, Inc.	North Carolina	100
Meadowlands Parkway Associates [General Partnership]	New Jersey	50

** An additional .01 percent of voting shares is owned by CBS/FOX VIDEO (South Pacific) Pty. Ltd.

*** Subject to agreement of sale dated November 19, 1987 with Sony Corporation; awaiting deferred closing.

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BRIEF OF RESPONDENTS ANDY ROONEY AND CBS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Andy Rooney and CBS Inc. respectfully submit that the petition for a writ of certiorari should be denied, because the court of appeals correctly applied the applicable law, there is no conflict in the circuits requiring resolution, and Petitioners have raised no question of federal law that merits review.

Counterstatement of the Case

A. *Petitioners Misrepresent the Decision of the Ninth Circuit*

Petitioners Unelko Corp. and Howard G. Ohlhausen misrepresent the decision of the Ninth Circuit by arguing that the court failed to follow this Court's decision in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990). To the contrary, the court of appeals carefully analyzed the allegedly defamatory statements in light of *Milkovich*, and concluded that the test for "opinion" applied by the district court was "obsolete" and the statements could not be protected on that basis. Nevertheless, the court of appeals also held that the statements were not actionable because Petitioners had failed to satisfy their burden of proof on the issue of falsity, one of the lynchpins of this Court's decision in *Milkovich*. *Id.* at 2706 (a separate privilege for "opinion" is unnecessary because sufficient safeguards for speech already exist, including the requirement that plaintiffs must demonstrate sufficient evidence of falsity to avoid summary judgment) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

B. *The Proceedings Below*

1. *The District Court*

During the April 17, 1988 broadcast of 60 MINUTES, Respondent Andy Rooney commented about junk mail that he received. One of the 13 items to which he referred was Petitioners' product, Rain-X: Rooney said he had tried it but it "didn't work." (The full text of the broadcast is set out in the Appendix at pages A-6-8; hereafter App. at ____).[1]

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[1] Rooney had received an unsolicited supply of Rain-X from Unelko following the *Arizona Republic*'s publication of his syndicated column entitled "RAIN," in which he reflected on his associations with rainy days. One of those musings concerned the need for larger windshield wipers to clean the entire windshield of his car. In response, Unelko wrote, saying that all he needed was "Rain-X," which it was forwarding so that he could "personally test and evaluate [its] performance . . ." (App. at A-5-6).

On May 4, 1988, Petitioner Ohlhausen and his company, Unelko Corp., filed a complaint in this diversity action against CBS Inc. and Rooney. Petitioners' complaint alleged defamation, product disparagement, and tortious interference with business relationships, based on statements made by CBS and Rooney in the 60 MINUTES broadcast. (Petition at 4; hereafter Pet. at ____). With respect to their defamation claim, Petitioners asserted that their product, Rain-X, was falsely portrayed by Respondents as not being efficacious and that everything Rooney said was false. (Pet. at 3).

On November 15, 1988, Petitioners were given leave to amend their complaint to include similar claims against Respondents, based on a 60 MINUTES segment that was broadcast on May 8, 1988 — four days after the filing of the complaint. (Pet. at 4; App. at A-10; the complete text of the second broadcast is set out at App. A-8-10).

On December 5, 1988, Respondents moved for summary judgment, which was granted on April 25, 1989. *Unelko Corp. v. Rooney*, 16 Media L. Rep. (BNA) 1737 (D. Ariz. 1989), *aff'd*, 912 F.2d 1049 (9th Cir. 1990). The court, applying Arizona law, held that summary judgment was appropriate because Petitioners had failed to demonstrate that any of Rooney's statements were substantially false. In addition, the district court held that Rooney's statements were opinion, and, therefore, absolutely protected. (App. at B-13-15).[2] Petitioners appealed from this ruling.

2. *The Court of Appeals*

The court of appeals, acting in light of *Milkovich v. Lorain Journal Co.* (which issued after the district court's decision and before oral argument in the appellate court), concluded that "the 'opinion' test applied by the district court [was] obsolete." Therefore, the court found "unwarranted" that portion of the

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[2] The court dismissed Petitioners' remaining claims on the ground that the defenses available to Respondents on the defamation claim were equally applicable to all other claims based on the same underlying statements. (App. at B-24-26).

district court's order which found that the complained of statements were constitutionally protected from liability as opinion. (App. at A-12).

However, the court of appeals recognized that it could affirm the district court "on any ground finding support in the record." (App. at A-12; citing *Jackson v. Southern Cal. Gas Co.*, 881 F. 2d 638, 643 (9th Cir. 1989)). *Accord*, *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Klingman v. Levinson*, 877 F.2d 1357, 1360 n.3 (7th Cir. 1989); *Railway Labor Executives' Ass'n v. Staten Island R.R. Corp.*, 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). Because the record was sufficiently developed to enable the court to determine whether Respondents' statements were statements of fact, and because Petitioners had submitted extensive evidence on the issue of falsity, the court applied the *Milkovich* analysis and searched the record to determine whether there was a triable issue of fact on the question of falsity. (App. at A-12).

Interpreting Arizona common law (App. at A-22) and applying the constitutional principles and standards for summary judgment established by this Court (App. at A-19-23), the court of appeals affirmed summary judgment on the ground that Petitioners had failed to meet their constitutionally required burden of demonstrating a factual issue with respect to whether any of Respondents' statements were substantially false. (App. at A-22-23).

The court concluded, as had the district court, that the evidence submitted on falsity was inferential and ambiguous at best and that no reasonable jury could render a verdict on behalf of Petitioners. (App. at A-21-23).[3]

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[3] The court of appeals affirmed the decision of the district court dismissing Petitioners' remaining claims on the ground that they could not be sustained where they were predicated on the same facts as a failed defamation claim. (App. at A-23).

The only issue before this Court is whether the Court should review the court of appeals' affirmance of the district court's dismissal of Petitioners' defamation claim.[4]

Summary of Argument

A writ of certiorari should "be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. Petitioners offer no such reasons.

Petitioners' assertion that the Ninth Circuit repudiated this Court's decision in *Milkovich* mischaracterizes the decision below. Indeed, to the contrary, the court of appeals scrupulously adhered to that decision and other applicable precedents of this Court and fully explained its conclusion in light of those decisions.

Petitioners' other argument, that *Milkovich* required the Ninth Circuit to remand, is equally misplaced. After appropriately reviewing the record *de novo*, the court rejected the district court's holding on opinion and affirmed the lower court on its alternative ground that Petitioners failed to present sufficient evidence to raise a factual issue on the question of falsity.

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[4] Petitioners present no arguments in the petition regarding their claims of product disparagement and tortious interference with business relationships. Neither claim raises any novel issues of constitutional or federal law.

Reasons for Denying the Writ

I. THE NINTH CIRCUIT CORRECTLY REVIEWED THE RECORD AND AFFIRMED SUMMARY JUDGMENT ON THE GROUND THAT PETITIONERS FAILED TO RAISE A TRIABLE ISSUE OF FACT ON THE QUESTION OF FALSITY.

Petitioners miss the the thrust of the Ninth Circuit's ultimate conclusion: in a case involving a matter of public concern (here, speech about product effectiveness), the Constitution requires Petitioners to come forward with sufficient proof to create a triable issue of fact on the question of falsity.[5] (App. at A-19-20; citing *Milkovich*, 110 S. Ct. at 2704 and 2706); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)); *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 481, 724 P.2d 562, 567 (1986); *Phoenix Newspapers, Inc. v. Church*, 103 Ariz. 582, 596-97, 447 P.2d 840, 854-55 (1968), *cert. denied*, 394 U.S. 959 (1969). Petitioners failed in this effort. (App. at A-22-23).

The question of falsity lies at the heart of both the decision of the court of appeals and the district court. Petitioners have always claimed that Respondents' statements were replete with falsehoods and, therefore, actionable. (Pet. at 3; App. at A-18). However, Petitioners' failure to produce adequate evidence of falsity formed the basis for the Ninth Circuit's affirmance of the district court. This conclusion is fully in accord with *Milkovich* as well as *Hepps* and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Accordingly, Petitioners' argument that the Ninth Circuit repudiated *Milkovich* simply reflects a misreading of the decision below. There is no reason for this Court to grant the Petition on this basis.

Petitioners assert that the court of appeals' "misapplication" of *Milkovich* led to an analysis of Rooney's after-the-fact stated

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[5] The petition does not address this issue at all.

intent, rather than an analysis of the statements made. (Pet. at 11-12). This ruling, they argue, "eviscerated" *Milkovich*, and deprived them of a jury trial to determine if the statements were defamatory. (Pet. at 12). They urge that remand was required because their discovery efforts were undertaken in light of law that had been reversed. (Pet. at 13-15). Petitioners even suggest that their Seventh Amendment right to a jury trial may be impaired if the decision is allowed to stand. (Pet. at 3, 12-15).[6]

Not only do these arguments ignore the Ninth Circuit's circumspect application of *Milkovich*, but also they ignore the fact that Petitioners' entire case was designed to demonstrate that Respondents' statements were false. (Pet. at 3, n.4; App. at A-3-4 and 20-23; B-6-13).[7] Petitioners even submitted supposed experimental test evidence, which they urged demonstrated that Rain-X worked. (App. at A-3-4 and 20-22; B-6-8 and 11-13).[8] It was this evidence the court of appeals reviewed in connection with Petitioners' contention that they had raised a triable issue of fact. (App. at A-20-23). It was this evidence which formed the basis for the conclusion that summary judgment was warranted.

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[6] Petitioners assert that the only basis for the district court's decision was that Rooney's statement was protected opinion (Pet. at 5-6), and that once a court determines that a statement contains an objectively verifiable statement of fact, it is automatically actionable. (Pet. at 10). Thus, they argue that because viewers could interpret Respondents' statements to mean that their product does not work, the failure of the Ninth Circuit to consider the impact of this statement on jurors implicated their Seventh Amendment rights and requires remand. (Pet. at 12-15).

[7] The petition even lists some of these challenges: that Rooney had not taken an hour to apply it (Pet. at 3, n.4; App. at A-4 and 21; B-7 and 9-11); that Rooney changed his testimony about which car he applied it to (Pet. at 3, n.4); and that Rooney could not remember exactly when he had applied it (Pet. at 3, n. 4; App. at A-4 and 21; B-7 and 9).

[8] Petitioners also took the depositions of Rooney; his wife, Marguerite Rooney; 60 MINUTES Executive Producer, Don Hewitt; and the producer of Rooney's weekly segment, Jane Bradford.

Moreover, Petitioners also misperceive the role of the court and ignore the "integral part" which summary judgment plays in the federal judicial system. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). To avoid summary judgment, Petitioners were required to "set forth specific facts showing that there [was] a genuine issue [of fact] for trial." (App. at A-19; citing *Anderson*, 477 U.S. at 250). Reviewing the grant of summary judgment *de novo*, as it was required to do under Fed. R. Civ. P. 56 (App. at A-10; citing *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir.), *cert. denied*, 110 S. Ct. 59 (1989)),[9] the Ninth Circuit applied *Anderson v. Liberty Lobby* and agreed with the district court's conclusion that no reasonable jury could conclude that Petitioners had met their "burden of proving falsity by a preponderance of the evidence." (App. at A-22).[10] The court found that the proffered evidence was ambiguous at best and, therefore, failed to meet the constitutional standard established by *Hepps*. (App. at A-22).[11]

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[9] *Cf.*, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (in a case of constitutional significance the court is required to search the record).

[10] "[T]he question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not." (App. at A-22; citing *Anderson*, 477 U.S. at 254 (emphasis in original)).

[11] The district court had noted that Petitioners "concede that Rooney could have used Rain-X in an improper manner [and] never directly contend that Rooney is lying or attempting to fabricate a cover story when Rooney states he applied Rain-X to the windshield of his car." (App. at B-8).

The court of appeals also found that: (1) Rooney's deposition testimony revealed "familiarity with Rain-X's properties when applied"; (2) no evidence had been offered to demonstrate "that traces of Rain-X on Rooney's vehicles would survive a Connecticut winter" and that Petitioners' literature stated that Rain-X's longevity "is dependent upon such factors as environment, climate, and time of year"; (3) contrary to Petitioners' assertions, Marguerite Rooney's testimony (which was offered by Petitioners) supported Rooney's deposition testimony that "he used Rain-X"; and (4) the experimental evidence

(Footnote continued)

Finally, relying on Arizona common law for the proposition that substantial truth, not literal truth, protects a statement from a claim of defamation (App. at A-22; citing *Fendler v. Phoenix Newspapers Inc.*, 130 Ariz. 475, 636 P.2d 1257 (Ct. App. 1981)), the court held that Petitioners' evidence failed to prove that any of Respondents' statements were "false in substance and thus was not sufficient to avoid summary judgment." (App. at A-22-23).

In this light, certiorari would be improvident. The court of appeals did not act on an empty record, nor did it fail to follow established law. Although the district court had granted summary judgment on both grounds, the court of appeals properly reviewed that decision in light of *Milkovich*, concluding that even if the statements were not deserving of protection as opinion, Petitioners had not demonstrated a triable issue on the question of falsity and summary judgment was constitutionally mandated, as *Hepps* requires.

The conclusion of the court of appeals should not be disturbed.

II. THE NINTH CIRCUIT SCRUPULOUSLY APPLIED THIS COURT'S DECISION IN *MILKOVICH v. LORAIN JOURNAL CO.*

The Ninth Circuit properly recognized that the "significant body of Ninth Circuit case law" granting absolute protection for statements of opinion, relied upon by the district court, had been "effectively overruled by the Supreme Court's recent opinion in *Milkovich v. Lorain Journal Co.*" (App. at A-11). Accordingly, the court held that the district court's conclusion that Respondents' statements enjoyed unqualified First Amendment protection was "unwarranted." (App. at A-12).

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offered by Petitioners was inadmissible due to a lack of foundation showing that the test was conducted under circumstances similar to the conditions under which Rooney had tried Rain-X. (App. at A-21-22). As stated by the district court, "It does not take the testimony of Willard Scott for this Court to take judicial notice of the fact that climatic conditions in Connecticut where Rooney resides are vastly different from those in the Phoenix area where the Unelko control vehicle was tested." (App. at B-12).

Although this Court declined to recognize a separate constitutional privilege for opinion in *Milkovich*, that decision did not dilute any of the established constitutional protections for speech. Among those safeguards, and especially relevant here, is that "'when a plaintiff seeks damages against a media defendant for speech of public concern,[12] [there is a] constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.'" *Milkovich*, at 2704; citing *Hepps*, 475 U.S. at 776.[13] The court of appeals, following *Milkovich* and *Hepps*, concluded that the district court's holding on falsity should be affirmed. (App. A-18-22).

Notwithstanding Petitioners' argument that the court of appeals ignored *Milkovich*, the opinion reveals otherwise. In finding that Rooney's conclusion that Rain-X "didn't work" could be construed as a statement of fact, the court looked at three factors:

> (1) whether Rooney used figurative or hyperbolic language that would negate the impression that he was seriously maintaining that Rain-X did not perform effectively; (2) whether the general tenor of Rooney's segment of "60 Minutes" negated this impression; and (3) whether the assertion that a product works is susceptible of being proved true or false.

(App. at A-13; citing *Milkovich* at 2697).

Applying this test, the court concluded that:

(1) although Rooney's remarks about other items he had received in the mail were characterized by hyperbole, his statements about Rain-X were not couched in "loose, figurative, or hyperbolic language," and could produce the factual

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[12] "[P]rotection of statements about product effectiveness will 'ensure that "debate on public issues [will] be uninhibited, robust and wide-open."'" (App. at A-20; citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

[13] The petition does not raise any question regarding this issue.

impression that Rain-X failed to perform as promised. (App. at A-14).

(2) although the overall tenor of Rooney's remarks were humorous and satirical, and his viewers realize they are getting Rooney's opinions, his statements about Rain-X reasonably could be viewed as factual. (App. at A-14-15).

(3) Rooney's observations about Rain-X performance were not so dependent on subjective evaluation as to be incapable of being objectively verified, *i.e.*, proved true or false. (App. at A-15-18).

Thus, the court of appeals found no protection for Respondents "under the standard established in *Milkovich*" and concluded that "the propriety of the district court's grant of summary judgment depend[ed] on whether [Petitioners] created a triable issue of fact as to the falsity of Rooney's statements." (App. at A-18).

Petitioners ignore this analysis, arguing that the court of appeals "rejected" or "violated" or "repudiated" *Milkovich* by affirming the district court. (Pet. at 7-12). These meritless arguments display a complete misreading and misunderstanding of the court of appeals' decision.

The court of appeals correctly followed established precedent of this Court and Petitioners' request for review should be denied.

III. THE NINTH CIRCUIT CORRECTLY RETAINED JURISDICTION BECAUSE THE RECORD WAS SUFFICIENTLY DEVELOPED TO AFFIRM THE DISTRICT COURT ON ONE OF THE TWO THEORIES FORMING THE BASIS OF ITS DECISION.

Petitioners contend that the Ninth Circuit was limited to finding that opinion was not a defense and summary judgment was therefore inappropriate. However, an intervening change in the law does not limit appellate review where there are sufficient

grounds to uphold a district court's decision on an alternative theory. *Heimbach v. Chu*, 744 F.2d 11, 13 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (where the decision of a lower court is correct, "it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason")); *see also Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Fidelity Fin. Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1437 (9th Cir. 1986.) ("We may affirm the district court on a ground not selected by the district judge so long as the record fairly supports such an alternative disposition of the issue."), *cert. denied*, 479 U.S. 1064 (1987).

Affirming on an alternative ground is particularly appropriate here because the parties had an opportunity to brief and argue that alternative theory at length. (App. at A-15-23, B-5-13). Accordingly, where, as here, a party has failed to make a showing "sufficient to establish the existence of an element essential to that party's case," summary judgment is mandated. (App. at A-19; citing *Celotex*, 477 U.S. at 322).[14]

The assertion that remand was required is without merit.

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[14] Petitioners' reliance on *Heirs of Fruge v. Blood Servs.*, 506 F. 2d 841 (5th Cir. 1975), is misplaced because the court there was limited to the one issue raised by the motion for summary judgment, charitable immunity. Here, there is no question that the record on both the questions of falsity and opinion were well developed and addressed by the district court. (App. at A-12-23 and B-5-24).

CONCLUSION

For the foregoing reasons, Respondents Andy Rooney and CBS Inc. respectfully request that the Court deny the petition for a writ of certiorari.

Dated: New York, New York
March 22, 1991

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States provides in pertinent part that: "Congress shall make no law. . . abridging the freedom of speech, or of the press. . . ."

COURT RULES

Federal Rule of Civil Procedure 56(b) provides: "*For Defending Party*. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

Federal Rule of Civil Procedure 56(c) provides in pertinent part that: "*Motion and Proceedings Thereon*. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."